

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CHARLES SHANK,

Plaintiff,

v.

KITSAP COUNTY, A Washington State  
Municipal Corporation; RON YINGLING;  
RANDY CASTEEL; CHRIS ENDRESEN;  
JON BRAND; BURT FURUTA; and  
MALCOLM FLEMING,

Defendants.

CASE NO. C04-5843RJB

ORDER GRANTING, IN PART,  
DEFENDANTS' MOTION FOR  
SANCTIONS

This matter comes before the Court on the Defendants' Motion for Sanctions for Plaintiffs Violation of Court Order and for Withholding Discovery. Dkt. 40. The Court is familiar with the records and files herein, and all documents filed in support of and in opposition to the motion. For the reasons stated herein, the motion should be granted, in part.

**I. FACTS AND PROCEDURAL HISTORY**

This 42 U.S.C. § 1983 matter arises out of Plaintiff's employment with Defendant Kitsap County. On February 22, 2005, Defendants served Plaintiff with Defendant Randy Casteel's Interrogatories and Requests for Production of Documents and Things Directed to Plaintiff and Defendant Jon Brand's Interrogatories and Requests for Production of Documents and Things Directed to Plaintiff ("interrogatories"). Dkt. 30. The interrogatories define "Documents," in part, as "electronic recordings" and "tape recordings." Dkt. 42-2, at 3. Plaintiff was required to provide answers and documents related to discovery by March 24, 2005. Plaintiff failed to provide the requested discovery. Dkt. 41. On May 31, 2005, Plaintiff filed a Motion to Allow In Camera Review

1 of Documents. Dkt. 28. Plaintiff failed to provide the Court with the documents or in any manner  
2 identify on what he sought *in camera* review. *Id.* On June 2, 2005, Defendants filed a Motion to  
3 Compel Discovery. Dkt. 29.

4 On June 14, 2005, this Court entered a stipulated order in which Plaintiff agreed to dismiss his  
5 motion for *in camera* review. Dkt. 32, at 1. The stipulated order indicates that the documents at  
6 issue in the *in camera* review, include, in part, electronic recordings made by David N. Smith. Dkt.  
7 32, at 2. Defendants additionally agreed to file a brief regarding: “1) the applicability of chapter 9.73  
8 RCW to certain conversations of County employees recorded by David N. Smith with a device  
9 designed to record or transmit such conversations . . . 2) whether any of all of the tape-recorded  
10 conversations are subject to Plaintiff’s request for discovery” by June 24, 2005. *Id.* at 2-3. Plaintiff’s  
11 Response was due on June 30, 2005 and Defendants’ Reply was due on July 8, 2005. *Id.* In a June  
12 29, 2005 discovery conference between the Court and counsel, the Court deferred ruling on the  
13 issues related to Dave Smith’s electronic recordings until after Dave Smith’s deposition. Dkt. 43, at  
14 3. No further action has been taken by either party on those issues.

15 On June 20, 2005, this Court granted Defendants’ Motion to Compel Discovery and ordered  
16 sanctions. Dkt. 35. The Order re: Motion to Compel Discovery and for Award of Attorney Fees and  
17 Sanctions (“Order Compelling Discovery”) provides:

- 18 1. Within two business days from the date of this Order, Plaintiff shall deliver, without  
19 objection, answers and documents responsive to Defendants Randy Casteel’s, Chris  
20 Endersen’s, Jon Brand’s, and Malcolm Fleming’s Interrogatories and Requests for  
21 Production of Documents and Things Directed to Plaintiff; and
- 22 2. Within two business days from the date of this Order, Plaintiff shall pay Defendants’  
23 attorney’s fees in the amount of \$270.00 and sanctions in the amount of \$300.00 for  
24 Plaintiff’s failure to make discovery in accordance with the Civil Rules.

25 Dkt. 35. On June 21, 2005, Plaintiff submitted answers to Defendants’ interrogatories. On June 22,  
26 2005 Plaintiff paid the sanctions. Dkt. 36. On June 30 and July 13, 2005 Plaintiff was deposed. Dkt.  
27 41, at 3. During the July 13, 2005 deposition, Plaintiff revealed that he had tape and electronic  
28 recordings, which had not been produced, that were within the scope of Defendants’ discovery  
requests. Dkt. 41-4. According to Plaintiff, most of the recordings at issue were downloaded onto

1 his computer. Dkt. 42, at 1. One of the recordings was on a cassette tape. *Id.* Plaintiff's counsel  
2 contends Plaintiff mistakenly told him the recording was on a mirco-cassette. *Id.*

3 Plaintiff delivered four electronic recordings to Defendants on July 19 and 20, 2005. Dkt. 43,  
4 at 2. Plaintiff delivered a cassette tape to Defendants on August 16, 2005. *Id.*

5 Defendants have exhausted the seven hours allowed for depositions under Fed. R. Civ. Proc.  
6 30(d)(2) as to Plaintiff. Dkt. 43, at 2. The discovery deadline in this case is September 25, 2005 and  
7 trial is set for January 23, 2006. Dkt. 27.

8 Pursuant to Fed. R. Civ. Proc. 37, Defendants move for either a dismissal of three of  
9 Plaintiff's claims (failure to receive a pay raise, hostile work environment, and failure to receive a  
10 promotion) or an order prohibiting Plaintiff from "introducing into evidence at trial the recordings and  
11 any statements made by the persons who were recorded." Dkt. 40. Defendants argue sanctions are  
12 appropriate because Plaintiff's failure to comply with this Court's order compelling discovery was  
13 willful, wanton and done in bad faith. *Id.* Moreover, Defendants argue that by withholding the  
14 recordings until after Plaintiff's deposition, they have been unfairly prejudiced. *Id.* Defendants argue  
15 that Plaintiff's Motion for *in camera* review of David Smith's recordings further evidences Plaintiff's  
16 withholding the recordings was willful, wanton, and in bad faith, because he was in possession of the  
17 recordings. *Id.* Lastly, Defendants argue that these sanctions are warranted because lesser sanctions  
18 were applied to no avail. *Id.*

19 Plaintiff opposes the motion in his Response filed on August 15, 2005. Dkt. 42. In his  
20 pleading, he claims that a majority of the recordings were downloaded onto his computer and have  
21 now been provided to the Defendants. *Id.* at 1. He argues that there is only one remaining tape to be  
22 turned over, a cassette recording made by David Smith. *Id.* Plaintiff argues his delay in producing  
23 the cassette tape was inadvertent and a resulted from a misunderstanding between himself and his  
24 counsel. *Id.* at 2. Plaintiff's counsel states that Plaintiff told him the recording was on a micro-  
25 cassette, when, in fact, the recording was on a regular cassette. Dkt. 42-2, at 2. Plaintiff also argues  
26 that Defendants are fully aware of the contents of the tape. Dkt. 42, at 1.

27 Defendants point out in their Reply that they seek sanctions not only for the tape that  
28 remained to be turned over as of August 15, but for Plaintiff's failure to turn over any of the tapes

1 until after his deposition in violation of the Order Compelling Discovery. Dkt. 43.

2  
3 **II. DISCUSSION**

4 Rule 37(b)(2) provides:

5 If a party . . . fails to obey an order to provide or permit discovery, including an order  
6 made under subdivision (a) of this rule . . . the court in which the action is pending  
may make such orders in regard to the failure as are just, and among others the  
following:

7 (A) An order that the matters regarding which the order was made or  
any other designated facts shall be taken to be established for the  
8 purposes of the action in accordance with the claim of the party  
obtaining the order;

9 (B) An order refusing to allow the disobedient party to support or  
oppose designated claims or defenses, or prohibiting that party from  
10 introducing designated matters in evidence;

11 (C) An order striking out pleadings or parts thereof, or staying further  
proceedings until the order is obeyed, or dismissing the action or  
proceeding or any part thereof, or rendering a judgment by default  
12 against the disobedient party; . . .

13 In lieu of any of the foregoing orders or in addition thereto, the court shall require the  
party failing to obey the order or the attorney advising that party or both to pay the  
14 reasonable expenses, including attorney's fees, caused by the failure, unless the court  
finds that the failure was substantially justified or that other circumstances make an  
award of expenses unjust.

15  
16 Defendants move to dismiss three of Plaintiff's claims as a result of his failure to comply with  
17 the order compelling discovery. Where the drastic sanctions of dismissal or default are imposed  
18 pursuant to Rule 37, the losing party's noncompliance must be due to willfulness, fault, or bad faith.  
19 *Computer Task Group, Inc. v. Brothby*, 364 F.3d 1112, 1115 (9th Cir. 2004)(*internal citations*  
20 *omitted*). In deciding whether a sanction of dismissal or default for noncompliance with discovery is  
21 appropriate, five factors are considered: "(1) the public's interest in expeditious resolution of  
22 litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the [opposing party];  
23 (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less  
24 drastic sanctions." *Id.* "Where a court order is violated, the first and second factors will favor  
25 sanctions and the fourth will cut against them." *Id.* Because this Court's Order Compelling  
26 Discovery was violated, whether terminating sanctions are appropriate turns on the third and fifth  
27 factors. *See Id.*

1 The third factor, the risk of prejudice to Defendants weighs slightly in favor of Defendants.  
2 The risk of prejudice to Defendants is moderate. While Defendants no longer have the opportunity to  
3 depose Plaintiff regarding the information on the tapes (without a court order), the discovery deadline  
4 is still one month away. Defendants now have knowledge of the content of the tapes and can depose  
5 relevant witnesses. Further, in light of Plaintiff's failure to turn over the recordings, the Court would  
6 entertain a motion to allow additional depositions, including one of Plaintiff. Keeping in mind that  
7 "belated compliance with discovery orders does not preclude the imposition of sanctions," *Payne v.*  
8 *Exxon Corp.*, 121 F.3d 503, 508 (9th Cir. 1997), and that "[l]ast minute tender of documents does  
9 not cure the prejudice to opponents," *Id.*, sanctions of some sort are appropriate. This opinion will  
10 address Defendants' alternative motion to exclude the tapes from evidence while addressing the fifth  
11 factor.

12 The fifth factor, whether less drastic sanctions than dismissal of the claims are available,  
13 favors the Plaintiff. Rather than dismissing the three claims, as Defendants propose, the more just  
14 result for Plaintiff's failure to comply with the discovery request and Order Compelling Discovery is  
15 to exclude the tapes from evidence at trial pursuant to Rule 37(b)(2)(B). Plaintiff repeatedly states  
16 his failure to turn over the recordings was not intentional. Dkt. 42.

17 In considering sanctions less severe than the drastic sanctions of dismissal or default, two  
18 factors are considered. "First, any sanction must be just; second, the sanction must be specifically  
19 related to the particular claim which was at issue in the order to provide discovery." *Navellier v.*  
20 *Sletten*, 262 F.3d 923, 947 (9th Cir. 2001)(*internal citations omitted*).

21 Excluding the tapes from evidence would be a just result. In explanation as to why the  
22 recordings were not turned over in compliance with the Order Compelling Discovery, Plaintiff argues  
23 the recordings were on his computer and not in a format easily copied, and that there was a  
24 misunderstanding between he and his counsel regarding the type of tape for one of the recordings.  
25 Dkt. 42-2, at 1-2. This is a wholly unacceptable basis for failing to comply with discovery requests  
26 and orders compelling discovery. Much of present day discovery is contained on computers. It is  
27 both parties' duty to comply with the rules of discovery and court orders despite technical difficulties.  
28 More concerning, however, was the fact that the recordings were not disclosed or turned over until

1 after Plaintiff's last deposition. Plaintiff's last minute compliance does not ameliorate prejudice to  
2 Defendants. Moreover, precluding the recordings from evidence is specifically related to the  
3 particular claim which was at issue in the order to provide discovery. *Navellier* at 947. Parties  
4 contend the recordings at issue relate to the three claims Defendants move to dismiss above. Dkts.  
5 41, 42, and 43. The Order Compelling Discovery dealt with discovery related to those claims. Dkt.  
6 35. The recordings should be excluded from trial. Defendants make no motion for attorneys fees or  
7 expenses, so none should be ordered at this time.

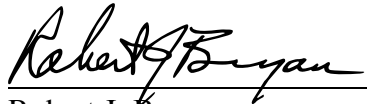
8 **III. ORDER**

9 Therefore it is:

10 **ORDERED** that Defendants' Motion for Sanctions for Plaintiff's Violation of Court Order  
11 and for Withholding Discovery (Dkt. 40) is **GRANTED IN PART**. The recordings Plaintiff failed to  
12 turn over to Defendants by June 22, 2005 are excluded from Plaintiff's case in chief.

13 The Clerk is directed to send uncertified copies of this Order to all counsel of record and to  
14 any party appearing *pro se* at said party's last known address.

15 DATED this 30<sup>th</sup> day of August, 2005

16 

17 Robert J. Bryan  
18 United States District Judge